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No. _____

United States Supreme Court
October Term 1993

State of California,

Petitioner.

Jose Ronillo Abogado LUCERO,
Jimmie JOHNSON,
WALNUT PROPERTIES, INC.,
a California Corporation,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Seven

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May retained (not court-appointed) defense counsel in a state misdemeanor criminal prosecution obtain public payment of his fees pursuant to 42 U.S.C. § 1988 in defending that state criminal action when that same attorney has earlier unsuccessfully sought similar publicly funded "criminal fees" pursuant to California's own statutory version of 42 U.S.C. § 1988 and been denied such fees as against state public policy?

2. Did Congress intend 42 U.S.C. § 1988 to apply to attorney fees for retained counsel who defend ordinary state criminal defendants?

3. Doesn't the immunity of Imbler v. Pachtman (1976) 424 U.S. 409 [47 L.Ed.2d 128, 96

S.Ct.984], which as a matter of federal public policy protects state prosecutors from fiscal intimidation by criminal defendants, likewise protect such state prosecutors from federal fiscal intimidation pursuant to 42 U.S.C. § 1988 as well?

4. Even if the common law had no immunity against injunction, a remedy which was never attempted hereinbelow, must we construe 42 U.S.C. § 1988 "statutory barratry" (public funding of private litigation--also contrary to common law) to allow fiscal intimidation of public prosecutors for their acts done within their "core immunity," i.e. the initiation of criminal litigation?

5. May a state criminal prosecutor be deemed to have been "successfully sued" pursuant to 42

U.S.C. § 1983 (so as to allow attorney fees pursuant to 42 U.S.C. § 1988) simply by virtue of a state criminal defense counsel's demurrer to state criminal charges, who thereafter pursues his unsuccessful criminal demurrer into higher state appellate courts in that criminal case, but without suing that criminal prosecutor (or the latter's municipal employer) separately, without naming the municipal prosecutor as a defendant in a civil action (under § 1983 nor any other statute), and without adequate notice to the prosecutor that the latter is in fact "being sued" as a civil defendant pursuant to 42 U.S.C. § 1983?

6. Doesn't it violate the state prosecutor's federal "due process/fairness/notice" to learn for the first time at the conclusion of lengthy state criminal

litigation over the sufficiency of the state criminal accusatory pleading, beginning in the inferior municipal court where the prosecutor was the clear criminal "plaintiff" representing the State of California and the named criminal defendants the "defendants" in that criminal matter, and ending finally in the state supreme court where the prosecutor "plaintiff" won clear victory over these named criminal "defendants," to learn to the prosecutor "plaintiff's" great surprise that the prosecutor wasn't a "plaintiff" at all in this litigation, but was in fact a federal civil "defendant" in an unpleaded and unproved 42 U.S.C. § 1983 action, with the criminal defendants being somehow civil "plaintiffs" pursuant to that federal statue so as to allow them attorneys fees under 42 U.S.C. § 1988?

7. If, as herein, ordinary retained criminal defense counsel (presumably already paid a retainer fee up-front by their non-indigent criminal clients) may obtain new and duplicate attorneys' fees--this time at state public expense pursuant to 42 U.S.C. § 1988 where, as herein, it is expressly contrary to state public policy to allow it under state law--does that not erroneously exalt 42 U.S.C. § 1988 into a de facto "federal repeal" of every state, federal, and territorial "court appointment" statute which limits payment of public fees solely to those criminal defense attorneys appointed by the court, authorized by state statute, and disbursed according to state procedures?

8. May criminal defendants be deemed "prevailing parties" under 42 U.S.C. § 1988 where they

never pleaded nor proved a violation of § 1983 and where at best they accomplished higher review in state appellate courts merely to sustain their demurrers in the criminal prosecution, but where the state prosecutor simultaneously obtained review in the highest state court overruling all state precedential authority wrongfully interpreting This Court's decision in Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440] to create an erstwhile state "preponderance" standard (50+% porn film exhibition)--a constitutional standard now abolished by virtue of our instant state criminal prosecution--where the state prosecutor substantially altered the legal relationship of the instant parties so as to render state prosecution of adult entertainment theaters easier hereinafter?

9. Assuming purely arguendo application of 42 U.S.C. § 1988 to our instant criminal prosecution, was it not an express "abuse of 42 U.S.C. § 1988" to allow fees instantly on the basis of criminal defendants' hypothetical "victory" on the issue of "single instance" of porn film exhibition, where state law prior to our instant Lucero I state supreme court decision was that a "preponderance"[1]/ (not merely a "single instance") of porn exhibition was exempted from

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[1]/ In the complete absence of any state law defining by number a "preponderance" of porn film exhibition at movie theaters, or the number of porn film exhibitions at a movie theater exhibiting porn films only PART of the time which constitute the constitutional "floor" above which number of porn film exhibitions the theater becomes "adult" for purposes of regulation by our instant porn-zoning ordinance, we have assumed a "partial-porn" movie theater to be allowed 182 days of total porn film exhibition per the normal 365-day calendar year (183 days of porn for a 366-day leap year). Porn film exhibition at a theater 182/365 °of the time would not "preponderate" because less than half of that theater's total movie exhibition. Nor would 183/366--exactly half--of a theater's film exhibition "preponderate," as half is not a "preponderance." See Pringle v. City of Covina, infra.

our porn-zoning ordinance, that is, didn't criminal defense counsel improperly "abandon his client" in favor of his own fee by arguing in favor of "single instance" in hopes of having "any victory at all" which might qualify as possibly prevailing on that issue so as to seek a public attorney fee under § 1988 when counsel ought to have argued for the greatest protection of his clients ("preponderance" or more) rather than the slightest possible ("single instance") protection of movie owners/exhibitors?

THE PARTIES

The parties, as in our typical criminal case, consist of the criminal prosecutor, i.e. the People of the State of California (represented in this matter by the Long Beach Prosecutor's Office,[2]/ which has

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[2]/ Our office, Long Beach Prosecutor, is a criminal misdemeanor office prosecuting state and local misdemeanor crimes committed within the City of Long Beach.

"The Government Code has vested crime-charging power in the public prosecutor . . . . . With limited exceptions, the public prosecutor in California is the district attorney. Each district attorney has jurisdiction over all felonies committed within his county and over misdemeanors committed in unincorporated areas . . . . . As a practical matter, though, most municipalities contract with the district attorney to prosecute their misdemeanors. Only a few of the larger southern California cities currently have their own city prosecutors. Further, the attorney general has jurisdiction over certain types of crimes . . ., but this jurisdiction is very limited in practice.

The power to charge is the most important power possessed by the district attorney. It is important because it gives the district attorney the power to select not only who will be charged with a particular crime, but also who will not be charged.

Prosecutors have a great deal of discretion in this crime-charging function. Charging discretion takes three basic forms: (1) evidentiary sufficiency--a determination of whether the evidence warrants prosecution; (2) charge selection--a determination of the appropriate charge or charges; and (3) discretion not to prosecute--a determination of whether there is an alterative to formal criminal prosecution. Each of these three basic forms of prosecutorial discretion covers a range of subissues and collateral issues."

4-5, our emphasis.

"The existence of judicially uncontrolled prosecutorial discretion has long been recognized by California courts."

6, our emphasis.

James I. K. Knapp, Ephraim Margolin, Nicholas C. Arguimbau (authors), John Bishop (ed. for CEB), PROSECUTORIAL DISCRETION (Berkeley, Regents of the University of Calif.,

independent city charter authority to prosecute state and local misdemeanors committed by criminal defendants within the city limits of Long Beach, California), opposed instantly by the three (3) joint-defendants herein, all of whom are owners or employees of the Lakewood Theater, a movie theater exhibiting BOTH porn and non-porn movies within the city limits of Long Beach, California.

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IT REMAINS CONTRARY TO FEDERAL PUBLIC POLICY TO SHIFT VIA 42 U.S.C. § 1988 ATTORNEY FEES FROM NAMED NON-INDIGENT CRIMINAL DEFENDANTS TO THE PUBLIC CRIMINAL PROSECUTOR WHERE THESE SAME ATTORNEYS HAVE UNSUCCESSFULLY ATTEMPTED THE IDENTICAL TACTIC TO RECOVER NON-APPOINTED "CRIMINAL FEES" FOR REPRESENTING NON-INDIGENT CRIMINAL CLIENTS PURSUANT TO CALIFORNIA'S EQUIVALENT OF 42 U.S.C. § 1988, WHEREIN THE STATE APPELLATE COURT DETERMINED THAT SUCH UNAUTHORIZED "CRIMINAL FEES" WOULD BRING "TOTAL CHAOS" TO CALIFORNIA'S CRIMINAL JUSTICE SYSTEM

II 29

CONGRESS NEVER INTENDED 42 U.S.C. § 1988 TO APPLY TO ATTORNEY FEES FOR RETAINED COUNSEL WHILE DEFENDING ORDINARY STATE CRIMINAL DEFENDANTS

III 37

THE IMMUNITY OF IMBLER V. PACHTMAN, WHICH AS A MATTER OF FEDERAL PUBLIC POLICY PROTECTS STATE PROSECUTORS FROM FISCAL INTIMIDATION BY CRIMINAL DEFENDANTS,

LIKEWISE PROTECTS THOSE SAME STATE PROSECUTORS FROM FEDERAL FISCAL INTIMIDATION PURSUANT TO 42 U.S.C. § 1988 AS WELL

IV 42

EVEN IF THE COMMON LAW HAD NO IMMUNITY AGAINST INJUNCTION, A REMEDY WITHOUT "FISCAL INTIMIDATION" WHICH WAS NEVER ATTEMPTED HEREINBELOW, WE NEED NOT CONSTRUE 42 U.S.C. § 1988 AS GENERAL "STATUTORY BARRATRY" TO OVERRULE THE "AMERICAN RULE" OF ATTORNEY'S FEES

V 51

IT VIOLATED THE STATE PROSECUTOR'S FEDERAL "DUE PROCESS/FAIRNESS/NOTICE" TO LEARN FOR THE FIRST TIME AT THE CONCLUSION OF LENGTHY STATE CRIMINAL LITIGATION OVER THE SUFFICIENCY OF THE STATE CRIMINAL ACCUSATORY PLEADING, BEGINNING IN THE INFERIOR MUNICIPAL COURT WHERE THE PROSECUTOR WAS THE CLEAR CRIMINAL "PLAINTIFF" REPRESENTING THE STATE OF CALIFORNIA AND THE NAMED CRIMINAL DEFENDANTS THE "DEFENDANTS" IN THAT CRIMINAL MATTER, AND ENDING FINALLY IN THE STATE SUPREME COURT WHERE THE PROSECUTOR "PLAINTIFF" WON CLEAR VICTORY OVER THESE NAMED CRIMINAL "DEFENDANTS," TO LEARN TO THE PROSECUTOR "PLAINTIFF'S" GREAT SURPRISE THAT THE PROSECUTOR WASN'T A "PLAINTIFF" AT ALL IN THIS LITIGATION, BUT WAS IN FACT A FEDERAL CIVIL "DEFENDANT" IN AN

UNPLEADED AND UNPROVED 42 U.S.C. § 1983 ACTION, WITH THE CRIMINAL DEFENDANTS BEING SOMEHOW CIVIL "PLAINTIFFS" PURSUANT TO THAT FEDERAL STATUE SO AS TO ALLOW THEM ATTORNEYS FEES UNDER 42 U.S.C. § 1988

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IF, AS HEREIN, ORDINARY RETAINED CRIMINAL DEFENSE COUNSEL (PRESUMABLY ALREADY PAID A RETAINER FEE UP-FRONT BY THEIR NON-INDIGENT CRIMINAL CLIENTS) MAY OBTAIN NEW AND DUPLICATE ATTORNEY'S FEES--THIS TIME AT STATE PUBLIC EXPENSE PURSUANT TO 42 U.S.C. § 1988 WHERE, AS HEREIN, IT IS EXPRESSLY CONTRARY TO STATE PUBLIC POLICY TO ALLOW IT UNDER STATE LAW--THAT ERRONEOUSLY EXALTS 42 U.S.C. § 1988 INTO A DE FACTO "FEDERAL REPEAL" OF EVERY STATE, FEDERAL, AND TERRITORIAL "COURT APPOINTMENT" STATUTE WHICH LIMITS PAYMENT OF PUBLIC FEES SOLELY TO THOSE CRIMINAL DEFENSE ATTORNEYS APPOINTED BY THE COURT, AUTHORIZED BY STATE STATUTE, AND DISBURSED ACCORDING TO STATE PROCEDURES

VII 59

CRIMINAL DEFENDANTS MAY NOT BE DEEMED "PREVAILING PARTIES" UNDER 42 U.S.C. § 1988 WHERE THEY NEVER PLEADED NOR PROVED A VIOLATION OF § 1983 AND WHERE AT BEST THEY ACCOMPLISHED HIGHER REVIEW IN STATE APPELLATE COURTS MERELY TO SUSTAIN THEIR DEMURRERS IN THE CRIMINAL PROSECUTION, BUT

WHERE THE STATE PROSECUTOR SIMULTANEOUSLY OBTAINED REVIEW IN THE HIGHEST STATE COURT OVERRULING ALL STATE PRECEDENTIAL AUTHORITY WRONGFULLY INTERPRETING THIS COURT'S DECISION IN YOUNG V. AMERICAN MINI THEATRES, INC. TO CREATE AN ERSTWHILE STATE "PREPONDERANCE" STANDARD (50+% PORN FILM EXHIBITION)–A CONSTITUTIONAL STANDARD NOW ABOLISHED BY VIRTUE OF OUR INSTANT STATE COURT LITIGATION--WHERE THE STATE PROSECUTOR SUBSTANTIALLY ALTERED THE LEGAL RELATIONSHIP OF THE INSTANT PARTIES SO AS TO RENDER STATE PROSECUTION OF ADULT ENTERTAINMENT THEATERS EASIER HEREINAFTER

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IT WAS EXPRESS "ABUSE OF 42 U.S.C. § 1988" TO ALLOW FEES INSTANTLY ON THE BASIS OF CRIMINAL DEFENDANTS' HYPOTHETICAL "VICTORY" ON THE ISSUE OF "SINGLE INSTANCE" OF PORN FILM EXHIBITION, WHERE STATE LAW PRIOR TO OUR INSTANT LUCERO I STATE SUPREME COURT DECISION WAS THAT A "PREPONDERANCE" (NOT MERELY A "SINGLE INSTANCE") OF PORN EXHIBITION WAS EXEMPTED FROM OUR PORN-ZONING ORDINANCE, THAT IS, CRIMINAL DEFENSE COUNSEL IMPROPERLY "ABANDONED HIS CLIENT" BY ARGUING IN FAVOR OF "SINGLE INSTANCE" IN HOPES OF HAVING "ANY VICTORY AT ALL" WHICH MIGHT QUALIFY AS POSSIBLY PREVAILING ON THAT ISSUE SO AS TO SEEK A PUBLIC ATTORNEY FEE UNDER § 1988 WHEN COUNSEL OUGHT TO HAVE ARGUED FOR THE GREATEST PROTECTION OF HIS CLIENTS

(PREPONDERANCE OR MORE) RATHER THAN THE SLIGHTEST POSSIBLE ("SINGLE INSTANCE") PROTECTION OF MOVIE OWNERS/EXHIBITORS

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CITATION TO OFFICIAL REPORTS BELOW

Our instant "Appendix" to our present Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California, contains accurate typewritten verbatim copies of our two (2) pertinent state court decisions hereinbelow: (1) our Appendix # 1 is People v. Superior Court (Lucero) (1989) 49 Cal.3d 14 [259 Cal.Rptr. 740, 774 P.2d 769] (recited hereinafter as

"Lucero I," and (2) our Appendix # 2 is Lucero v. Municipal Court (People) (1993) 15 Cal.App.4th 784 [19 Cal.Rptr.2d 143]--"depublished" by order of the California Supreme Court August 12, 1993 (recited hereinafter as "Lucero II"). The latter, Lucero II, is the instant judgment for attorney fees we seek to reverse by this writ. The amount of the fees is no longer the stated $35,000 + $1,773 costs mentioned in the Lucero II judgment, but has now risen to "$85,000" according to recent estimates by Stanley Fleishman,[3]/ leading partner in Fleishman, Fisher & Moest, opposing counsel in both Lucero I and in Lucero II because of their additional efforts to collect the fee from our office during our writ

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[3]/ Mr. Fleishman has stipulated with our office to defer rendering his supplemental fee petition pursuant to 42 U.S.C. § 1988 until after This Court grants or denies our instant Petition for Writ of Certiorari. He agrees with the figure of "$85,000" as "ballpark accurate" for some of his supplemental fees, not including additional fees for prosecution of his § 1988 fee award before This Court.

Mr. Fleishman is being compensated pursuant to § 1988 hereinbelow at the rate of approximately $350 per hour.

review through the California appellate courts.

JURISDICTIONAL STATEMENT

Jurisdiction is sought under 28 U.S.C. § 1257(a) to review the judgment of the California Court of Appeal, Second District, affirming for the first time in the history of California the above-mentioned award of attorney's fees pursuant to 42 U.S.C. § 1988 to retained, non-appointed criminal defense counsel at public expense for the latter's pursuing demurrers to state criminal complaints initiated by our office in the Long Beach Municipal Court, where This Court's decision of Imbler v. Pachtman (1976) 424 U.S. 409 [47 L.Ed.2d 128, 96 S.Ct.984], grants state prosecutors, such as our office, "absolute immunity" from such fees as a matter of federal public policy, and where Congress never remotely intended 42 U.S.C. § 1988 to pay attorneys for criminal defense in state court misdemeanor prosecutions. We do NOT attack the constitutionality of

42 U.S.C. § 1988, but attack merely the latter's application to our instant state criminal prosecution.

STATUTE INVOLVED

The federal statute upon which the instant awarding of fees at public expense to non-appointed, non-indigent criminal defense counsel is 42 U.S.C. § 1988.[4]/ It was recited in Respondents' moving papers.[5]/

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[4]/ That federal statute states in pertinent part as follows:

> *"(a) Applicability of statutory and common law.*
> *The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of the Title 'CIVIL RIGHTS,'and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.*
>
> *(b) Attorney's fees.*

STATEMENT OF THE CASE

Our instant lengthy litigation with instant Respondent owners of Lakewood Theater over the Long Beach adult entertainment ordinance (hereinafter "porn-zoning" ordinance) commenced in 1977 when Respondent criminal defendants--owners/operators of the "Pussy Cat" chain of porn theaters--purchased the Lakewood Theater in order to exhibit 100% XXX-rated porn movies therein in violation of the Long Beach adult entertainment ordinance, which like the Detroit "scatter" ordinance of Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440],

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In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . . ."

[5]/ Correct copies of Respondents' moving papers below, including their original writ petition in Lucero I (our Appendix # 4), and including the trial court judgment in Lucero I (our Appendix # 5), as well as their original petition for fees (our Appendix # 6), are all included in our instant bound Appendix to this Petition for writ of certiorari.

required such porn theaters NOT to locate within 1,000 feet of each other nor within 1,000 feet of a church or religious structure, nor within 1,000 feet of a public school. Lakewood Theater lay within the 1,000 foot restrictions in both its distance from a religious structure and distance from a public school. There then existed numerous other 100% porn theaters inside the City of Long Beach, including a separate "Pussy Cat" porn theater owned by Defendant-owners herein, which were deemed "grandfathered" exemptions from the Long Beach porn-zoning ordinance because of their prior existence in Long Beach before the enactment of the ordinance in 1977. Thereafter commenced numerous civil lawsuits and appellate litigation[6]/ (usually by instant

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[6]/ The virtually incessant litigation between instant Lakewood Theater owners and the City of Long Beach, mischaracterized by Lucero II--see our Appendix # 2 pp. 43-45--to appear to be city harassment of theater owners, was nothing of the kind. As reflected in our state petition for rehearing in state Court of Appeal below, it was instant theater owners, not the City of Long Beach, which initiated the bulk of that litigation--each time represented by instant attorneys Fleishman, Fisher & Moest.

theater owners--represented by the instant private law

Our instant appellate record shows conclusively that instant Defendant theater-owners "plagued" the City of Long Beach with a constant barrage of lawsuits, most of which were not criminal in nature, hence were not related to our office, nor were we privy to them. Our record reveals no fewer than 5 lawsuits initiated by instant Respondents against this criminal office or the City of Long Beach in connection with their various schemes of porn film exhibition at their Lakewood Theater. (1) Miranda v. Pitchess, U.S. Dist. Ct. No. 81-0548, federal habeas relief denied, summarily reversed and remanded by our Ninth Circuit Court of Appeal in No. 83-5740; (2) the same federal habeas petition again denied, U.S.Dist. Ct. No. 81-9548, appeal dismissed, Ninth Cir. No. 84-5685; (3) Miranda et al. v. Winston, U.S. Dist. Ct. No. 83-1665 (MCX); (4) Walnut Properties, Inc. v. Ussery (1986) 178 Cal.App.3d 186 [223 Cal.Rptr. 511], depublished by order of the California Supreme Court, June 24, 1986) which had named our office, the Long Beach City Prosecutor, as co-defendant to Lakewood Theater owners' unsuccessful civil action for injunctive and declaratory relief (and for attorney's fees) against co-defendant City of Long Beach, creating we contended "collateral estoppel" between our office and these particular Lakewood Theater owners, i.e. the same parties prosecuted criminally in the instant Lucero II, infra; (5) Walnut Properties, Inc. v. City of Long Beach, U.S. Dist. Ct. No. 81-942-TJH, constitutional attack upon the Long Beach porn-zoning ordinance rejected, appeal dismissed U.S. Ninth Cir. No. 81-5732; (6) Walnut Properties, Inc. v. Long Beach City Council (1980) 100 Cal.App.3d 1018 [161 Cal.Rptr. 411], mentioned repeatedly in Lucero II; (7) Crawford et al. v. Municipal Court, L.A. Sup. Ct. No. 391086, appeal dismissed 2d Civ. 67250, instant Respondents' attempted writ of mandate to assume Pringle protection for their 100% porn exhibition scheme at Lakewood Theater. The foregoing is but a partial list of legal actions initiated by instant criminal Defendants against us or the City of Long Beach. Vincent "Miranda" mentioned repeatedly hereinabove was then primary shareholder of Walnut Properties, Inc., often suing in his own name.

firm, Fleishman, Fisher & Moest--against the City of Long Beach, represented NOT by our office, which is purely a criminal prosecutor's office[7]/ housed in the police headquarters building, but by the Long Beach City Attorney's Office--the charter-assigned legal representative of the City of Long Beach, separately housed at city hall.

In 1981 Pringle v. City of Covina (1981) 115 Cal.App.3d 151 [171 Cal.Rptr. 251] decided for the first time in California that only those movie theaters would

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[7]/ There is no connection whatever between the functions of the civil Long Beach City Attorney's office and our instant criminal Long Beach City Prosecutor's office. The head of each respective office is separately elected every 4 years at the Long Beach general municipal election. The two offices are separately housed, separately defined within the Long Beach City Charter, separately funded, separately staffed, and separately administered.

The numerous civil lawsuits by instant criminal defendants against the City of Long Beach, including Walnut Properties, Inc. v. Long Beach City Council (1980) 100 Cal.App.3d 1018 [161 Cal.Rptr. 411]--wherein they might possibly have obtained § 1988 attorney's fees, had they been successful in their litigation, was defended by the City's legal department, the Long Beach City Attorney's Office. Our office was not privy to any of those lawsuits, although named as co-defendant in some of them.

be deemed "adult"--hence subject to such porn-zoning ordinances as ours instantly ONLY if they exhibited porn[8]/ a "preponderance" of the time. Pringle effectively killed all porn-zoning prosecution in California for the physical difficulty and insufficient police resources to monitor all movie theaters all the time to see "how

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[8]/ That is, adult movies, as defined in our Young-based ordinance. People v. Superior Court (Lucero) (1989) 49 Cal.3d 14 [259 Cal.Rptr. 740, 774 P.2d 769], hereinafter " Lucero I," depicts the eventual demise of the Pringle, supra, "preponderance regime" in California.

We have included a correct copy of Lucero I as Appendix item "# 1" to our instant Petition because it was the case wherein instant criminal defense attorneys claim to have "earned" their right to 42 U.S.C. § 1988 attorney's fees hereinbelow, and upon which the instant fee order, Lucero II, was made at the completion of Lucero I.

We have included a correct copy of Lucero v. Municipal Court (People) ___ Cal.App.4th ___ [19 Cal.Rptr.2d 143], "depublished" by order of the California Supreme Court, August 12, 1993, hereinafter "Lucero II," as our Appendix item "# 2." The latter is the judgment of the court for fees we seek to have vacated by this Petition for Writ of Certiorari.

"Depublishing" occurs in California in the "vast majority" of cases "*because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent.*" (Now retired) Justice Joseph R. Grodin, "The Depublication Practice of the California Supreme Court," 72 Cal. L. Rev. 514, 514-515, n. 7, (1984).

often" they exhibited porn movies.[9]/ As soon as the ink was dry on the state Pringle opinion, Respondent owners began exhibiting "partial porn" at Lakewood Theater as reflected in the following stipulations. At our request Long Beach Police commenced its 22 month surveillance of Lakewood Theater, purchasing copies of the movies for use at trial, rather than interfering with movie operations by seizing such movies.[10]/ This 271

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[9]/ Our instant Lucero I has correctly overruled Pringle, reducing the latter's constitutional standard of "preponderant" porn film exhibition to the now lesser standard of Lucero I's newly formulated "regular and substantial course of conduct" standard (cf. Appendix # 1, p, 20, n. 11).

[10]/ We were very sensitive to any claim of "harassment" by criminal Defendants herein, and therefore exercised extreme caution NOT to interfere with the operations of the Lakewood Theater and Defendants'/Respondents' full freedom to select what kinds of movies would be shown and where at Lakewood Theater.

Twelve counts of adult film exhibition, between July 23 and August 19, 1986, were alleged against each of the 3 named defendants, or 36 counts in all. This is plain and conclusive rebuttal to the allegation that our office alleged but a "single instance" of film exhibition in the instant complaints. At no time did we allege but a "single instance" of film exhibition at the Lakewood Theater. We alleged those multiple dates and movies named in the criminal complaints because they were the only occasions when Long Beach Police officers

had sat through the entire movie, taking notes thereon, so as to be able to testify that each movie met the other major requirement of our statute, i.e. that the movies be "characterized by an emphasis upon" the specified anatomical areas and/or sexual activities named in the ordinance. The latter element of our ordinance was never in issue in Lucero I, being implicitly conceded by Defendants' demurrers to our criminal complaints, and expressly stipulated as well. See Stipulation # 1, p. 8, infra.

The police officers had visited the Lakewood Theater on numerous occasions, but without sitting through the entire film, thus rendering them incapable of testifying to the entire content of each adult film. Indeed, the burdensome task of viewing completely each film each day it was exhibited was a prime motivation of our attack upon the Pringle "preponderant use" standard. Not only did our police officers not interfere with the exhibition of the porn movies at the Lakewood Theater, they didn't even seize any of those films for evidence. Rather they purchased each film separately for use as evidence in court. This required additional police time in order to view completely the purchased copy of the films, and compare the contents to confirm they were exactly the same films as exhibited at the Lakewood Theater. Our office was in direct control of police surveillance of the Theater and its film exhibition; we had instructed police scrupulously to avoid any claim of interference with Defendants' First Amendment rights. Nor did police officers intimidate Lakewood Theater personnel, nor seek in any fashion to close the Theater, its porn film exhibitions, nor seize any of its assets of any kind.

Although somewhat outside our appellate record in Lucero I, which was based solely upon our criminal pleadings and Respondents' criminal demurrers, we recite the foregoing facts to show the blatant unfairness of Respondents' instant attempt to characterize their state writ of mandate as somehow a federal 42 U.S.C. § 1983 action, authorizing § 1988 attorney's fees. Had our office truly been faced with a federal § 1983 action, we certainly would have proved the above-

surveillance report by Long Beach police was summarized in the following stipulations entered by the parties in 1983, and which continued unaltered throughout the instant 1986 criminal prosecution:

> *"(1) That the movies represented in People's Exhibit #1, the 271-page surveillance report of the movies exhibited at the Lakewood Theater (generally from May 8, 1981 to March 4, 1983), violated the 'preponderant' exhibition of 'specified sexual activities' and/or 'specified anatomical areas' of our instant zoning ordinance.*
>
> *(2) That the 'adult' movies were shown on consecutive 3-day weekends through most of the nearly 2 year period of surveillance.*
>
> *(3) That the exhibition pattern at the theater changed for approximately 2*

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mentioned facts in order to defeat any claim of factual interference with the Theater's federal First Amendment rights.

Indeed, we think it violates our federal due process to allow the instant attorney's fees where no § 1983 action was properly pleaded nor proved, and where, ignoring legal immunity, the People's proof of no factual violation of § 1983 was never allowed nor called for below. At a minimum, a federal § 1983 claimant must plead and prove his § 1983 claim before § 1988 attorney's fees may occur. Kentucky v. Graham (1985) 473 U.S. 159 [87 L.Ed.2d 114, 105 S.Ct. 3099].

weeks in June-July, 1981, wherein 3-day weekend adult exhibition changed to a 7-day weekly schedule of alternate adult, non-adult film exhibition at the theater.

(4) That 'recently' (per the record of September 22, 1983) the adult/non-adult film exhibition schedule was altered to show 100% adult films in one of the 2 interior screens[11]*/ while simultaneously exhibiting non-adult, longer running films in the other interior screen at the Lakewood Theater.*[12]*/*

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[11]/ Emphasis added. Notice this 100% porn film exhibition at one of its two interior movie screens rendered the Lakewood Theater a "100% porn theater" (at at least one of its screens) despite Pringle "preponderance" protection, thus triggering all the deleterious "secondary effects" of 100% porn exhibition condemned in Young v. American Mini Theatres, Inc., supra.

[12]/ Respondent theater owners' civil action against co-defendants Long Beach police chief, Charles Ussery AND the named Long Beach Prosecutor, John A. Vander Lans in Walnut Properties, Inc. v. Ussery, supra, was undertaken in order to validate this stipulated porn exhibition scheme at our instant Lakewood Theater, which on its face appeared to be a "fraud" against This Court's Young, supra, (100% porn exhibition) decision by use of state court Pringle's supposed "partial porn" context. Is a theater "partial porn" under Pringle when it exhibits porn 100% of the time at one of its screens?

We mention Respondents' foregoing "Pringle fraud" herein to show that even if our instant Lucero I criminal complaints had alleged Pringle "preponderance"--which they did not, so that we might attack Pringle directly--even so we might have won Lucero I WITHOUT striking down Pringle, if merely we had obtained state appellate recognition and

(5) That the total adult film exhibition time never exceeded the non-adult film exhibition time of both interior screens at the theater."

On one occasion during the persistent stipulation # (4) exhibition regime[13]/ recited above police reported

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rejection of "Pringle fraud" in this stipulated porn exhibition scheme, which is in fact 100% porn exhibition attempting to disguise itself as "partial porn" exhibition under Pringle.

[13]/ That stipulated # 4 exhibition regime continued unabated from 1983 throughout the state Court of Appeal review and until the initial grant of review by our state supreme court in Lucero I, November 18, 1987, whereupon Respondent owners--apparently seeing the future legal handwriting on the wall--unilaterally ceased exhibiting porn films at all, eventually leased Lakewood Theater to a third party operator, who commenced exhibiting 100% general release (non-porn) films. Eventually the Lakewood Theater site was sold, demolished, and new construction erected thereat--all during the pendency of Lucero II. Office buildings now occupy the space once occupied by Lakewood Theater.

We mention the foregoing to rebut conclusively Respondents' claim to have obtained "an injunction" allowing exhibition of porn films against us in Lucero I. At the time Respondents' attorneys filed their request for attorney's fees pursuant to 42 U.S.C. § 1988 on December 18, 1989, effectively initiating their Lucero II, Respondents no longer held a beneficial interest in Lakewood Theater, and if so, had abandoned by voluntary conduct their exhibition of all porn ("adult") movies at that theater, thus rendering them factually incapable of obtaining such "an injunction." See our note # 69, infra.

seeing the non-porn movie erroneously akilter, off-screen, and unviewable by theater patrons, but it continued to run in that fashion for several hours because, typically, there were no patrons in that non-porn portion of the theater to complain, anyway.

Please notice that our instant criminal charges reflect offenses occurring in July and August, 1986. For almost 3 years after the 1983 date mentioned in stipulation # 4, quoted hereinabove, and continuing consistently thereinafter during the pendency of Lucero II, our office patiently bided our time restrained by Pringle's death-dealing "preponderant" exhibition standard while Respndents continued (stipulation # 4) to exhibit 100% porn at one of its two interior movie screens at Lakewood Theater. For more than 5 years--1981 to the filing of our instant criminal complaints hereinbelow in 1986, and almost 2 more years to the initial grant of hearing by our supreme court in Lucero

I, November 18, 1987, cf. People v. Superior Court (Lucero) (1988) ___ Cal.App.3d ___ [244 Cal.Rptr. 502],[14]/ vacated by Lucero I, we were constrained from prosecuting and/or restrained from interfering with Lakewood Theater porn film exhibition by Respondents herein because of Pringle.

In November, 1987 upon grant of review by our state supreme court, Lakewood Theater voluntarily ceased all exhibition of porn films.[15]/ Soon Respondent owners leased Lakewood Theater to third parties, who commenced 100% non-porn film exhibition therein. Eventually, Respondent owners sold the realty upon which Lakewood Theater sat. New owners of that site demolished Lakewood Theater, and constructed office

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[14]/ Review was granted May 26, 1988, a second time by our state supreme court, after this Court of Appeal decision. Initially, November 18, 1987, our supreme court had granted review, directing the matter straight to our Court of Appeal for decision. See the initial state Court of Appeal recitation of facts and times quoted herein at our note # 65.

[15]/ See our note # 69, infra.

buildings at its erstwhile location. Our office never proceeded to trial in Long Beach Municipal Court upon the original criminal charges, for we deemed such prosecution now moot.

December 18, 1989, Respondents initiated Lucero II with their instant request for attorney's fees pursuant to 42 U.S.C. § 1988. Respondents' attorneys were awarded $35,000 + $1,773 costs mentioned in the Lucero II judgment, which has now risen to "$85,000"[16]/ for additional legal effort (i.e. Lucero II) to collect those fees, yet does not include additional fees for efforts before This Court to claim those fees.[17]/

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[16]/ See our note # 3, infra.

[17]/ Should we be unsuccessful before This Court, we expect Respondents' fees to be well in excess of $100,000. The latter sum approximates the annual earnings of two deputy city prosecutors for the City of Long Beach, and represents an unanticipated and impossible budgetary foresight for our office.

We contend that Imbler, infra, "core immunity" protects our prosecutor's office from having to anticipate such devastating and surprising fiscal penalty by criminal defense counsel.

STAGE WHEREIN FEDERAL QUESTION RAISED

Respondents hereinbelow "mentioned" by a reference or two the issue of "attorney's fees" pursuant to 42 U.S.C. § 1988 in their original writ papers in Lucero I as well as explicitly afterwards in their fee petition commencing their Lucero II. See our instant Appendix pp. 85-86, 88, 91-92, 102, 104-105, 116. Our criminal office simply ignored them because of Fogelson, infra, Imbler immunity, and the absence of Congressional intent to apply 42 U.S.C. § 1988 to defense of state criminal prosecutions.

ARGUMENT

I

IT REMAINS CONTRARY TO FEDERAL PUBLIC POLICY TO SHIFT VIA 42 U.S.C. § 1988 ATTORNEY FEES FROM NAMED NON-INDIGENT CRIMINAL DEFENDANTS TO THE PUBLIC CRIMINAL PROSECUTOR WHERE THESE SAME ATTORNEYS HAVE UNSUCCESSFULLY ATTEMPTED THE IDENTICAL TACTIC TO RECOVER NON-APPOINTED "CRIMINAL FEES" FOR REPRESENTING NON-INDIGENT CRIMINAL CLIENTS PURSUANT TO CALIFORNIA'S

EQUIVALENT OF 42 U.S.C. § 1988, WHEREIN THE STATE APPELLATE COURT DETERMINED THAT SUCH UNAUTHORIZED "CRIMINAL FEES" WOULD BRING "TOTAL CHAOS" TO CALIFORNIA'S CRIMINAL JUSTICE SYSTEM

The very same lawyers who have been instantly "successful" on the basis of what we shall call herein "criminal blinders,"[18]/ i.e. 42 U.S.C. § 1988 in the state criminal context, are the identical lawyers who were "laughed out" of state[19]/ court for unsuccessfully

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[18]/ That is, "blinding" a state court to the criminal nature of this litigation, thereby avoiding Fogelson's fee preclusion, but accomplishing the same illegality forbidden in Fogelson by current use of federal § 1988 in the state criminal context.

Decision by This Court that 42 U.S.C. § 1988 MAY NOT be used in our instant criminal context will end such "sham supremacy" of federal law and "criminal blinders" in state criminal prosecutions.

Criminal defense counsel's seeking "federal supremacy" in § 1988 is a "sham" not because § 1988 is fraudulent in any sense at all, but because state criminal attorneys fraudulently "pretend" to assert "federal supremacy" in § 1988 when in fact they're simply trying to avoid the plain attorney fee preclusion of Fogelson.

[19]/ The question here is MAY a non-appointed state criminal defense lawfirm, which cannot as against state public policy recover public-funded fees for representing non-indigent, defendants in state criminal actions NEVERTHELESS recover those fees upon the "sham supremacy" basis of federal statutes, i.e. 42 U.S.C. § 1988?

attempting this same "criminal fees" tactic pursuant to California's own "private attorney general statute," Code of Civil Proc. § 1021.5.[20]/ We think it against federal public policy (hence against § 1988) for criminal defense

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We assert herein that a state judge MUST REFUSE, i.e. has no discretion to award, attorney's fees pursuant to 42 U.S.C. § 1988, where state public policy already exists for denying such fees in the identical state context. No state judge may recognize nor state criminal defendant be allowed to assert a criminal defendant's "sham supremacy" of the federal fee statute where the state fee statue has already determined such a fee to bring "total chaos" to the state criminal justice system.

For this reason alone the fee award hereinbelow must be reversed and a clear principle enunciated by This Court to the effect that state public policy will not be allowed to be frustrated by criminal defense counsel's artfully pleading such criminal fee motions in terms of the federal, rather than the plainly improper state fee statute.

[20]/ C.C.P. § 1021.5 reads in pertinent part as follows:

> *"Upon motion, a court may award attorney's fees to a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."*

counsel to be allowed to bring "total chaos"[21]/ to our state's criminal justice system by their simple stratagem of adding the magical phrase, "42 U.S.C. 1983,"[22]/ to the caption of their document seeking state review of their criminal demurrers, a state review which did NOT sound in 42 U.S.C. § 1983, in any event,[23]/ but which

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[21]/ See Fogelson, infra.

[22]/ See our separately filed Appendix, items ## 4, 5, and 6 (Appendix page references infra, at our text, p. 14, reflecting the sparse, but existing, "federal" allegations of our supposed misconduct hereinbelow.

We think at a minimum Respondents were required to give us adequate "notice" of such federal allegations by explaining in their original moving papers why our absolutely pervasive Fogelson and/or Imbler immunities were no longer extant herein, so that we might take them seriously.

[23]/ This lack of meaningful "notice" informing us of pending FEDERAL claims NEVER pleaded nor proved pursuant to federal requirements of § 1983, constitutes clear violation of our "due process," treated herein at our Point V.

As we note in our discussion of Bravo v.Cabell, post, our public prosecutor's office was correct to regard criminal defendants' pretrial writ review of our criminal pleadings as purely CRIMINAL in nature no matter what the "civil" manner in which that criminal review was undertaken. That "criminal review" occurred as defense in a criminal prosecution, NOT as independent initiation of "civil rights" actions pursuant to 42 U.S.C. § 1983 nor any other principle of federal law. These criminal defendants, therefore, pursued NONE of the

was undertaken merely to review[24]/ the sufficiency of the criminal complaints. The leading case, brought by our instant attorneys, Fleishman, Fisher & Moest, is People v. Fogelson (1981) 120 Cal.App.3d 858 [175 Cal.Rptr. 64]:

> *"Petitioner and appellant Fogelson seeks a determination that section 1021.5 of the Code of Civil Procedure may, in a proper case, be used to pay the attorney's fees incurred by a defendant in a criminal action. . . .*

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independent purposes Congress intended to protect by either § 1983 nor § 1988.

This entire fee litigation (Lucero II) was nothing but criminal defendants' studious effort to (mis)characterize our litigation as "civil" when in fact it has remained "criminal" throughout. Fogelson correctly saw the criminal nature of that municipal prosecution. Instantly, Lucero II has donned "criminal blinders" to avoid looking at the criminal nature of our municipal prosecution herein. We seek the assistance of This Court properly to strip our instant state appellate courts of their "criminal blinders" in "federalizing" the fee award (§ 1988) to the "total chaos" of state criminal justice.

[24]/ If § 1988 fees be allowed in our instant review of criminal pleadings, there is no principled way to prevent § 1988 fees from being awarded any time a criminal defendant "prevails" (§ 1988) on any motion, any trial, or any appeal. Our state criminal justice system is surrounded by a panoply of federal constitutional principles, any one of which will likely have been violated whenever a criminal defendant be successful pretrial, at trial, or post trial.

Since we are quite convinced that the Legislature never intended section 1021.5 to apply to attorney's fees incurred in the defense of a criminal prosecution,[25]/ we shall not waste any time on the question of procedure . . . .

We have examined all available legislative materials and can assert with confidence that nothing so much as winks at the possibility that section 1021.5 might be applied to attorney's fees incurred in the defense of criminal cases.[26]/ Nor have we found a single criminal case among those which apparently triggered the legislation [citing This Court's Alyeska Pipeline Co. v. Wilderness Society, which necessarily includes FEDERAL law as well!]. Finally a case to which section 1021.5 is much indebted as far as its precise language is concerned--La Raza Unida v. Volpe [another federal case, please notice]--is, of course, a civil case.

In sum: nothing we have found supports petitioner on the basic question whether the Legislature intended section 1021.5 to apply to

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[25]/ We likewise are identically convinced that Congress never remotely intended 42 U.S.C. § 1988 to apply to attorney's fees in criminal cases. Nor have Respondents recited EVEN ONE example of § 1988 fees being awarded in a criminal PROSECUTION (state or federal). "Prisoners' conditions" injunctions (e.g. Hutto v. Finney) obviously don't count, as the latter are not criminal PROSECUTIONS.

For this reason alone the instant judgment must be reversed and the clear federal guideline established that § 1988 fees may NOT be recovered in ordinary defense of state criminal prosecutions.

[26]/ We assert the same regarding 42 U.S.C. § 1988.

cases such as petitioner's.

. . . Nothing would be clearer than that chapter 6 addresses only the question of costs and attorney's fees in civil actions. Were one to follow petitioner's suggestion and interpret the word 'action' whenever it appears in chapter 6 to include criminal prosecutions, total chaos would result.[27]*/*

In brief the context in which section 1021.5 appears would make it a highly imaginative exercise of judicial legislation to apply it to criminal cases. [Citing 4 state cases.] The legislative intent being plain,[28]*/ we simply have no occasion to discuss the many considerations of public policy which petitioner advances in favor of legislation which would reimburse his attorney. However desirable such legislation might be, section 1021.5 is not it.*[29]*/*

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[27]/ We respectfully suggest that the same "total chaos" will result if 42 U.S.C. § 1988 be applied to state court criminal prosecutions.

[28]/ We think it equally "plain" respecting 42 U.S.C. § 1988. And, as in Fogelson, "that ends" our inquiry and decides our instant case.

It was not for our instant state Court of Appeal to construe FOR ITSELF and against the plain Congressional meaning of 42 U.S.C. § 1988 that fee awards may be allowed in ordinary defense of state criminal prosecutions.

[29]/ Nor is 42 U.S.C. § 1988. Not a word therein "even winks at the possibility" of construing it to include defense of criminal cases thereunder.

We deem the foregoing analysis of C.C.P. § 1021.5 to apply equally to 42 U.S.C. § 1988. This statutory analysis,

Finally, petitioner points out that the same result--invalidation of [a Los Angeles City municipal code section]--could have been obtained in a civil action for an injunction or, more probably, for a declaratory judgment. [Citations.] In fact the petition filed below incorporates the complaint in one such action as an exhibit and asserts that 'the results achieved . . . in [petitioner's] criminal action . . . are not cognizably different in terms of public benefit [than those] which could or would have been achieved in an affirmative civil action . . . .' In addition petitioner points to several cases such as [2 federal Court of Appeals cases] in which arguably similar results were achieved under the federal Civil Rights Act and attorney's fees were awarded under the aegis of 42 U.S.C. section 1988.

The short answer to these arguments is that petitioner did not obtain[30]*/ an injunction. a*

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equally applicable to § 1988, is complete rebuttal to our instant state court of appeal opinion hereinbelow.

[30]/ Nor did our instant criminal defendants. All the artful word-twisting of our instant state Court of Appeal hereinbelow to give the appearance of civil litigation is to no avail. This was a simple criminal prosecution with typical writ review to state appellate courts (resulting in our earlier Lucero I) upon the constitutionality of Pringle and sufficiency of our criminal pleading. That the procedures in that review of criminal pleading required mandatory use of traditional "civil or common law prerogative writs" (e.g. the writ of mandate) is wholly irrelevant. The underlying litigation was criminal. Criminal defendants' pretrial "writ review" was the only method, short of trial and criminal appeal, by which criminal defendants could

declaratory judgment or relief under the Civil Rights Act. He successfully[31]/ defended a criminal prosecution at an alleged cost in attorney's fees of $35,000. The fact that petitioner might have reached the same result in some other type of action[32]/ tells us nothing about the legal costs that would have been incurred in such an action. We simply cannot apply a statute designed to compensate parties for attorney's fees in certain limited situations to cases not within the statute[33]/ on the theory of what might have been."

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have obtained review of this important question of law--a question ("preponderance" of porn movie exhibition) which our office ultimately won in Lucero I.

[31]/ We would say "unsuccessfully" defended the criminal case herein. The upshot of our instant (Lucero I) criminal demurrer litigation was the outright destruction of and explicit overruling of Pringle's erstwhile "preponderance" standard.

[32]/ As our reference to Bravo v. Cabell (1974) 11 Cal.3d 834, 839-840 [114 Cal.Rptr. 618, 523 P.2d 658] in our main text above makes clear, no matter what the "civil" manner of the writ review of our instant criminal pleadings, that writ review was CRIMINAL in nature, character, and origin.

Notice that Head's express approval of Fogelson decides our instant matter herein, which identical to Fogelson (and brought by identical attorneys hereinbelow) involved wholly and nothing but defense of a criminal prosecution.

[33]/ Our criminal prosecution, too, was "not within the statute" (42 U.S.C. § 1988), but it is for a federal, not a state court to construe § 1988 definitively. We seek that definitive construction of § 1988 herein, excluding all such fees incurred during defense of state criminal defendants.

Id., 120 Cal.App.3d at 859, 861-863 [175 Cal.Rptr. at 64, 65-67], emphasis added.[34]/

Fogelson, supra, is nearly identical[35]/ to our

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[34]/ Forgive our lengthy quotation of Fogelson, above, but that state case is squarely identical to our instant federal question now before This Court, was raised by our identical attorneys herein, and was decided correctly therein, unlike our instant Lucero II hereinbelow.

Fogelson was praised by our state supreme court in a different context in In re Head (1986) 42 Cal.3d 223 [228 Cal.Rptr. 184, 721 P.2d 65]:

> *"Justice Kaus [in Fogelson] was correct. Both the language of section 1021.5 and the history of the private attorney general doctrine which it codifies reflect a legislative purpose of encouraging the initiation of actions to vindicate statutory and constitutional rights, as well as important public policies, in circumstances in which the expense of litigation would otherwise deter private parties from doing so. The criminal defendant does not initiate the action, and his self interest provides incentive enough to assert available defenses. . . . A decision which has as its primary effect the vindication of the litigant's personal rights is not one which brings into play the attorney fees provision . . . ."*
>
> In re Head, supra, 42 Cal.3d at 228 [228 Cal.Rptr. at 186, 721 P.2d 65], emphasis added.

[35]/ That Fogelson involved the state version of 42 U.S.C. § 1988, rather than § 1988 itself, is no difference when one considers, cf. our Point II, infra, that any review of Congressional intent regarding § 1988 identically reveals "not even a wink" at any intent to apply that federal fee statute to state criminal defense counsel.

instant criminal municipal ordinance prosecution, and even involves the identical criminal defense attorneys herein as existed therein. And, exactly as was the criminal case in Fogelson, so, too, our instant criminal prosecution proceeded to higher state courts (Lucero I and Lucero II).[36]/ Unlike Fogelson, however, our instant criminal prosecution terminated in our state supreme court (Lucero I) with clear victory for our office, rather

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[36]/ Mr. Fogelson proceeded to higher state appellate courts via the "certification" route, Rule 63, Calif. Rules of Court. To be "certified" to the intermediate Court of Appeal the case must begin as an appeal to the Appellate Department of the Superior Court, after final judgment in municipal court. Because so few cases (criminal or civil) achieve "certification" from superior court (to the higher Court of Appeal) in their appellate status as appeals to superior court, the "preferred method" of handling important legal questions pretrial, hence avoiding final judgment, trial, and the appellate route altogether, is to "writ" (usually mandate or prohibition) the question immediately to the higher superior court, which allows discretionary treatment (rather than mandatory appellate treatment) of the issue.

Review of the superior court "writ" decision is no longer by (mandatory) appeal to the Court of Appeal, but by discretionary further "writ" review pursuant to California Code of Civil Proc. § 904.1(a)(4). Thereby are the thousands of municipal (inferior) court matters, civil and criminal, kept out of the higher appellate courts in California by allowing the latter summary discretionary, but not mandatory, review thereof.

than for criminal defendants, as in Fogelson.[37]/

Were criminal defendants' efforts by writ review[38]/

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[37]/ Ironic that Fogelson's admittedly victorious criminal defense attorneys were allowed no "public interest" attorney's fees, but instantly those same attorneys WERE allowed federal "public interest" (§ 1988) attorney's fees where they were NOT ultimately victorious in their state criminal defenses.

[38]/ This entire fee litigation ought to have been nipped in the bud at the initial state trial court (law and motion) level, where we raised the many aspects of "total chaos" which would result to our criminal justice system from granting attorney's fees hereinbelow

Incredibly, as recently as a month ago our instant state trial (law and motion) judge hereinbelow inquired as to the legal basis for our writ to This Court. Apparently the "total chaos" to California criminal justice mentioned in Fogelson, supra, isn't good enough for him; he needs a federal Fogelson to make it clear. We hope this writ petition will produce--even summarily--such a federal Fogelson.

The state statutory immunities in California protecting government employees and state prosecutors in particular are the Imbler-like "absolute immunity" of Government Code § 821.6:

> *"A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."* Emphasis added.

Also there is the more qualified Government Code § 820.2:

> *"If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been*

of our instant criminal pleadings in Long Beach Municipal Court hereinbelow "civil" actions upon which a 42 U.S.C. § 1988 attorney's fee might be awarded? No. Under California law it was plain that all such "writ review"[39]/ of our criminal complaints and their criminal demurrers remained "criminal" in nature however civil their method of review:

> *"We believe that in the context of the two cases at bench the proceedings for extraordinary writs should likewise be considered as a part of the criminal actions to which they refer. . . . We discern no significant difference between a review of a criminal proceeding by an appeal*[40]/

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liable had the enactment been constitutional, valid and applicable."

[39]/ That prerogative writs, such as mandate and/or prohibition, may have been considered "civil" for some reasons is wholly irrelevant to our instant criminal prosecution wherein the instant writs were employed.

Criminal defense counsel were required to use common law "civil writs" (here mandate) in order to be allowed immediate--pretrial--review of the central pleading issue, i.e. the sufficiency of our instant criminal complaints.

[40]/ We know of no counsel in any state foolish enough to seek 42 U.S.C. § 1988 attorney's fees for representing a criminal defendant throughout her criminal APPEAL. If allowed

from a judgment of conviction and a review of part of the same criminal proceeding by prerogative writ [41]*/to justify the conclusion that while the former process of review retains the criminal character of the proceeding below, the latter process is in some mysterious way substantially, if not entirely, metamorphosed.*

Indeed, a proceeding for a prerogative writ arising from a criminal action appears to us to have features inherently similar to an appeal from a judgment of conviction. Both methods of review are limited to issues involved in the criminal action, and they have a common objective of correcting or preventing error . . . on the part of the trial court in the underlying action.

. . . Such writ proceedings initiate no new controversy but relate only to the action below. They are made necessary by events in the criminal action and . . . are 'a part of the proceedings in the case to which it refers' rather than as 'a new adversary suit.'

. . . We hold that where, as in the instant cases, a proceeding for an extraordinary writ is brought in the superior court which arises out of a criminal proceeding in the municipal court, such

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hereinbelow, this state court will have effectively allowed it by our state "writ review" which was fully tantamount to pretrial "appellate review" of this important criminal pleading issue. Cabell v. Bravo, supra, saw the plain similarities between "appeal" and pretrial "writ" review of legal issues. Cf. our text, p. 27, infra.

[41]/ Precisely as was our instant criminal defendants' pretrial "prerogative writ review" of the issue of Pringle-preponderance by prerogative writ of mandate hereinbelow.

> *writ proceeding, however denominated in nature as an entity in itself, must be regarded as a part of the underlying criminal action . . . .*"[42]/
>
> Bravo v. Cabell (1974) 11 Cal.3d 834, 839-840 [114 Cal.Rptr. 618, 523 P.2d 658], emphasis added.

Our instant criminal prosecutor's office, of course, paid no court filing fees at all[43]/ in the numerous appearances of Lucero I and Lucero II (three times before our state Supreme Court, four times before our state Court of Appeal, several times before our state Superior Court)[44]/ because of the criminal nature of this entire litigation.

Bravo, supra, marks precisely our instant writ review of a municipal court criminal prosecution--and it

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[42]/ Again, this "decides" our instant case. Congress never intended § 1988 to pay attorneys for defense of state criminal actions. "However denominated" Respondents' instant "writ" proceedings were CRIMINAL in nature and purpose.

[43]/ Nor did instant criminal defendants in all their numerous appearances in those same state appellate courts.

[44]/ From criminal prosecution which began, and remained all the while, in the Long Beach Municipal Court.

remains "criminal" throughout despite its otherwise civil aspects, and wholly irrespective of what it is called nor however it be "denominated." It could not be plainer, therefore, that our instant writ review of our criminal pleadings hereinbelow was "criminal" from beginning to end. As such it was reversible error for any court--state or federal--to grant attorney's fees pursuant to 42 U.S.C. § 1988 in this criminal prosecution.

II

CONGRESS NEVER INTENDED 42 U.S.C. § 1988 TO APPLY TO ATTORNEY FEES FOR RETAINED COUNSEL WHILE DEFENDING ORDINARY STATE CRIMINAL DEFENDANTS

There is not the slightest evidence of Congressional intent to apply § 1988 to attorneys defending ordinary state (or federal) criminal prosecutions. We look in vain throughout the intensive judicial scrutiny of legislative underpinnings of § 1988 for even a "wink" (paraphrasing Fogelson, supra) of

evidence allowing that legislation to apply to state criminal prosecutions. Even the majority in Maine v. Thiboutot (1980) 448 U.S. 1 [65 L.Ed.2d 555, 100 S.Ct. 2502], which refused to "repeat at length the scanty legislative history" adding the words "and laws" to § 1983, admitted that the legislative "ambit" was a "civil action authorized by that statute." 448 U.S. at 7 [65 L.Ed.2d at 561], emphasis added. The fees provision (§ 1988), therefore, was enacted to aid the initiation of "civil actions"--not defense against criminal prosecutions.

We need not delve into the "federal caseload" increased by civil § 1983 actions, see the dissent in Thiboutot, supra,[45]/ but can you imagine the tidal wave

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[45]/ The classic statement seems to be from Judge Kocoras:

> *"In a paroxysm of hyperbole, the plaintiff has described this as a case which 'shocks the conscience [and] is fundamentally offensive to civilized society.' . . . He is right in a very limited sense, but not at all in the way he thinks.*
>
> *It can be said with a substantial degree of certainty that*

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when Representative James Madison, who was later to become the fourth president of the United States and who has been called the "Father of the Constitution,' stood before the First Congress on June 8, 1789 and explained his proposed bill or rigths, neither he nor any of our nation's other forefathers had a situation like this in mind. Nor is it even remotely likely that anyone conceived of something like this in those dark days following the Civil War when Congress enacted section 1 of the Ku Klux Klan Act of 1871 (now 42 U.S.C. § 1983) to stem the tide of lynchings and other horrors perpetrated by the nightriders against the newly-freed slaves and their supporters. Only after 1976, when Congress passed a law that virtually guaranteed a plaintiff an award of attorney's fees if he managed to 'prevail' in a civil rights case, did lawsuits like this become not only thinkable but commonplace. With an assurance that their fees would be paid by the defendant if their client 'prevailed' in any way [i.e. § 1988], including settlement of a bogus suit for its nuisance value, and with no appreciable downside (losing plaintiffs almost never have to pay a victorious defendant's fees under the statute), lawyers flocked to the federal courts to file 'civil rights' cases./ Some good has come of this, of course, but many of these so-called civil rights actions have proven to have nothing whatever to do with civil rights as that term is normally understood. Instead, the Constitution, has been debauched as lawyers, 'not overly hindered by the courts,' have endeavored to transform even the most petty complaints against local governments into federal cases of constitutional dimension. Rather than vindicating fundamental rights, such lawsuits over the trivial annoyances of everyday life actually diminish public esteem for the Constitution. When every misstep of government, no matter how slight, is seized upon as creating a cause of action entitling its holder to a chance at receiving a cash jackpot from a federal jury,**/ plus an award of attorney's fees as an automatic bonus, important values are lost and the Constitution comes to be looked upon as a sort of lottery ticket. . . . ."*

Newman v. Village of Hinsdale (N.D.Ill.E.D, 1984) 592 F.Supp. 1307-1308, emphasis

of § 1988 writs which will work their way to This Court, if as hereinbelow § 1988 be interpreted to apply to defense of ordinary state criminal prosecutions?

In Perkins v Cross (8th Cir. 1984) 728 F.2d 1099, 1100, the court made it plain that attorneys would receive no § 1988 fees for work done in the underlying municipal court criminal action:[46]/

"On remand, the district court should determine

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added.

*/Instantly Respondents haven't needed even to file a federal action at all, but have recovered their (sham) "§ 1988 attorney's fees" in the original state criminal action itself.

**/Our instant Lucero II "short-circuit procedure" would allow state criminal defendants to bypass the "federal jury" altogether.

[46]/ Our instant Lucero II purports to follow Perkins, cf. Appendix # 2, p. 56, where it recites Perkins and Greer. In fact Lucero II "distinguishes out of existence " Perkins, infra, Borunda, infra, and the entire line of authority following the plain meaning of § 1988.

This latter "short-circuit" is part of the "total chaos" predicted by Fogelson, supra, if § 1988 attorney's fees were ever allowed to be gained, as hereinbelow, in the criminal action itself.

which items in the fee request relate to the prosecution of the successful civil rights claims, and which do not. In particular, we think no award should be made for time the lawyer spent in behalf of the four appellants whose civil rights claims were dismissed.[47]*/ These four appellants are clearly not 'prevailing parties*[48]*/ within the meaning of section 1988. Moreover, no fees should be awarded for any time the lawyer spent defending the appellants in the original municipal*

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[47]/ No such "civil rights action" was filed in our instant case, giving us the chance as "civil rights defendants" to have such an hypothetical action dismissed against us. In the multiple instances of civil litigation instituted by instant owner-defendants against the City of Long Beach over their Lakewood Theater's relationship to our instant porn-zoning ordinance, including those mentioned, infra, at our note # 6, it was plain that instant theater owners understood the difference between "initiating civil litigation" (possibly compensated by § 1988) and our instant "defense of criminal prosecution" (never compensated by § 1988). As Fogelson's example show us, instant criminal defense attorneys sought deliberately to confuse legally the disparate and contrary purposes of attorney compensation pursuant to § 1988. Unless This Court grants certiorari herein, their strategy of intentionally confusing § 1988 will succeed, to the abiding "confusion" of federal law hereafter.

It is hard to conceive how our instant criminal prosecution in Lucero I could possibly have violated these criminal defendants' "civil rights" when Lucero I decided the constitutional issue in OUR favor and against Respondents.

[48]/ As we note in our Point VII, infra, instant criminal defendants also were not "prevailing parties" in Lucero I hereinbelow. For this reason alone they were not entitled to fees, even if for some reason § 1988 were deemed to apply to our instant criminal defense situation.

court proceeding,[49]/ *except to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of the later civil rights claims*[50]/ *of those two appellants who received*

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[49]/ Instantly, our theater owners never got beyond the "original municipal court proceeding," as California law in Bravo, supra, makes clear.

This entire litigation has been nothing but defendants' elaborate charade to make it falsely appear that their instant use of a common law prerogative writ of mandamus (mandate) in pretrial judicial review of their criminal demurrers was separate, civil, and detached from our instant criminal prosecution. It wasn't separate, nor civil, nor apart from the latter criminal action.

[50]/ No such "later civil rights" claims were ever filed hereinbelow. Had such civil actions been filed hereinbelow, they would have been defended by the City's civil law department, i.e. the City Attorney, not our office, City Prosecutor, which deals exclusively with criminal, not civil, matters.

That our instant Court of Appeal in Lucero II was willing entirely to "confuse" Congressional intent in 42 U.S.C. § 1988 by wrongfully applying it to criminal defense of non-indigent defendants CONTRARY TO EVERY STATE'S appointment of counsel for indigent criminal defendants statutes, rather than solely in favor of prevailing plaintiffs "initiating otherwise deterred" civil rights lawsuits, must be rectified by This Court, lest federal § 1988 become the criminal tail which "wags the dog" in bankrupting every state's criminal justice system under false application of federal supremacy.

As repeated state and federal judicial opinion has declared, "criminal defendants are not 'deterred' from hiring counsel in defending themselves against criminal prosecutions." See our quotation of In re Head, infra, at our note # 34. Indeed Gideon v. Wainwright (1963) 372 U.S. 335

nominal damages, on which they prevailed, and which related to the various other claims on which they did not prevail. [Citation.] The court should also determine whether the appellants 'achieved a level of success[51]/ that makes the hours reasonably expended a satisfactory basis for making a fee award."

Emphasis added.[52]/

[9 L.Ed.2d 799, 83 S.Ct. 792]--for misdemeanors Argersinger v. Hamlin (1972) 407 U.S. 25 [32 L.Ed.2 530, 92 S.Ct. 2006]--gives the latter Sixth Amendment claim to such attorney's fees for indigent criminal defendants. Why destroy the latter attorney appointment scheme, present in all states and U.S. territories, by "confusing" it with § 1988 and "extending" it via § 1988 to NON-indigent criminal defendants at the instant rate of $350 per hour?

[51]/ We examine the "level of success" for instant criminal defendants in our Point VII, infra, to show no "success" at all, but great "loss" was "gained" by Respondents in our instant Lucero I criminal prosecution. Indeed, Respondents' "success" was so small as to preclude them "prevailing party" status in Lucero I. It was hardly "successful" for a theater owner to be told that BEFORE our instant Lucero I her theater was protected from our regulation a "preponderance" (182/365) of the daily calendar, but AFTER our Lucero I her theater is now protected only for a "single instance" (1/365) of the dialy calendar. Is that "success"? Not at all.

[52]/ Our own Ninth Circuit explicitly agrees with Perkins and implicitly against our instant state Lucero II in Borunda v. Richmond, 885 F.2d 1384, 1389 (9th Cir. 1988):

"Appellants cite two cases, Perkins [citation] and Greer [citation] for the proposition that attorneys' fees cannot be awarded for time spent in defending against prior criminal charges. . . . Both Perkins and Greer involved attorney fee awards pursuant to 42 U.S.C. § 1988.

Because Congress never intended 42 U.S.C. § 1988 attorney's fees to apply to our instant state criminal prosecution Lucero II's use of the latter federal statute hereinbelow must be vacated.[53]/

> *Both cases held that attorneys' fees incurred in defending against a prior criminal charge are not compensable within the meaning of § 1988. [Here follows the case footnote # 4 at this point:] The plain language of § 1988 supports these holdings. Section 1988 provides that in actions brought 'to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee.'*
>
> Emphasis the court's.

Borunda did allow the criminal attorney's fee costs to be recouped in a LATER civil § 1983 lawsuit as an element of damages, pleaded and proved, against police unlawful arrest, but Borunda was quick to eliminate such "damages" against a state prosecutor, who has "absolute immunity" in her absolute prosecutorial discretion to file criminal charges. See Borunda, supra, 885 F.2d at 1390 n.5. Instantly, of course, any such as yet unfiled "later civil action" would have been necessarily against our office, the Long Beach Prosecutor, which likewise enjoys "absolute immunity" against such lawsuits, even where attorney's fees might be proved as damages.

[53]/ Of course, Lucero II "short-circuits" the entire "later civil action" by improperly allowing the § 1988 fees to be gained, without pleading and without proof (and without any notice to the state prosecutor nor consideration of prosecutorial immunity) in the original criminal action itself! See our Point I, infra.

This is part of the "total chaos" (Fogelson, supra) to

III

THE IMMUNITY OF IMBLER V. PACHTMAN, WHICH AS A MATTER OF FEDERAL PUBLIC POLICY PROTECTS STATE PROSECUTORS FROM FISCAL INTIMIDATION BY CRIMINAL DEFENDANTS, LIKEWISE PROTECTS THOSE SAME STATE PROSECUTORS FROM FEDERAL FISCAL INTIMIDATION PURSUANT TO 42 U.S.C. § 1988 AS WELL

The very same well-established federal immunity[54]/ from fiscal intimidation accorded state

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California criminal justice which inures from Lucero II hereinbelow. The latter is California's--not This Court's--problem, but it's being perpetrated by use of a "federal § 1988" sham which This Court clearly may correct. Nor is the "federal § 1988" tactic limited to California. Once the tactic becomes known to the criminal defense bar, it will extend to every state and U.S. territory to bring "total chaos" to their criminal justice systems as well. See Judge Kocoras' diatribe against the excesses of § 1988 herein at our note # 45.

[54]/ However "thin" the prosecutor's immunity may become at the "edges" of the prosecutor's activities unrelated to prosecution and presentation of evidence, e.g. investigation of facts, advising police, etc., like Imbler we here involve solely the "core immunity" of a state prosecutor's decision to bring criminal charges and advocate those charges through higher reviewing courts:

> *"We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.*

prosecutors, that the latter may independently[55]/ serve

> *We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages*/ under § 1983."*
> Imbler v. Pachtman (1976) 424 U.S. 409, 431 [47 L.E.2d 128, 144, 96 S.Ct.984], emphasis added.
>
> */And for § 1988 attorney's fees of any kind, we would add.

[55]/ That is, freed from fiscal civil consequences of their "core" executive decisions to prosecute crime (to bring what kind of, and how many, allegations of crime, and against whom, to confiscate instrumentalities of crime, etc.), or not--"fiscal considerations" which must NOT form any part of the criminal justice system. The leading authority is This Court's Imbler v. Pachtman (1976) 424 U.S. 409 [47 L.Ed.2d 128, 96 S.Ct. 984] itself:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation*/ would cause a deflection of the prosecutor's energies from his public duties,**/ and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust . . . . One court expressed both considerations as follows:
>
> 'The office of the public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most

in their important executive function, applies equally against fiscal intimidation from 42 U.S.C. § 1988 as well.

> conscientious officials by those who would profit thereby. There would be involved in very case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the, prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The world of the prosecutor would thus be impeded and we would have move away from the desired objective of stricter and fairer law enforcement.' [Citation.]
>
> The common-law rule of immunity is thus well settled. We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983. We think they do."
>
> Id., 424 U.S. at 422-424 [47 L.Ed.2d at 139-140], emphasis added.

*/Including "litigation" over § 1988 attorney's fees, as herein.

**/As the instant state prosecutor admitted in the trial court below, he never would have instigated this--ultimately successful at great public benefit--criminal prosecution against Respondents if he had thought his office susceptible of budget-bursting liability in excess of $100,000 for this decision to prosecute.

The identical federal policy considerations which protect state prosecutors from fiscal intimidation[56]/ by lawsuits for money judgments likewise protects them from fiscal intimidation from money-judgment-like § 1988 attorney's fees. In each case the "fiscal intimidation"--and consequent failure of adversary criminal justice--is the same. In each case the federal immunity protects identical principles of prosecutorial independence essential for a system of criminal justice.

Because all state antagonist criminal justice

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[56]/ "Fiscal intimidation" is not merely a cute phrase, but conceptually cuts the heart out of our adversary system of justice. If 42 U.S.C. § 1988 attorney's fees be allowed herein, it marks the end of independence for criminal prosecutors. Before Lucero II fiscally immune prosecutors could assess prospective criminal charges with an eye single to justice, evidence, and proof. Since Lucero II prosecutors no longer look solely to the justice of their criminal cases, but must now look to "downside fiscal risk" to their operating budgets as well.

With at least one eye on their fiscal budgets, criminal prosecutors will no longer advocate "close" or "difficult" cases, to the eternal detriment of criminal justice. Factual truth will no longer be the goal, but rather protecting "downside risk" as in civil litigation. The resultant loss in adversariness to our criminal justice system will be worse than Fogelson's understated "total chaos."

systems[57]/ are properly adversary in nature for the maximum production of factual truth, we cannot allow that proper and fundamental adversariness to be structurally altered by disabling criminal prosecutors from the ardor and zeal necessary to discover that factual truth. We must ask this Court to strike down Lucero II with its implicit destruction of our California criminal justice system.[58]/

IV

EVEN IF THE COMMON LAW HAD NO IMMUNITY AGAINST INJUNCTION, A REMEDY WITHOUT "FISCAL INTIMIDATION" WHICH WAS NEVER ATTEMPTED HEREINBELOW, WE NEED NOT CONSTRUE 42 U.S.C. § 1988 AS GENERAL "STATUTORY BARRATRY" TO OVERRULE THE "AMERICAN RULE" OF ATTORNEY'S FEES

Respondents make much of the so-called

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[57]/ Except, perhaps, Louisiana, which retains the adversariness of the Napoleonic Code, but not the typical adversariness Anglo-American jurisprudence.

[58]/ This, again, is part of what Fogelson termed "total chaos" to California criminal justice if § 1988-like attorney's fees be granted retained criminal defense counsel.

"ordinary" rule of Newman v. Piggie Park Enterprises, Inc. (1968) 390 U.S. 400, 402 [19 L.Ed.2d 1263, 88 S.Ct. 964, 966] wherein a prevailing plaintiff[59]/

> *"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."*

The foregoing rule is met with three insurmountable obstacles to its application herein: (1) Respondents weren't "plaintiffs" at all, but remained criminal defendants[60]/ throughout the duration of our criminal prosecution hereinbelow; (2) Respondents did not "prevail" in Lucero I--see our Point VII, infra; (3) "total chaos" to our criminal justice system[61]/ is but one

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[59]/ The only "prevailing plaintiff" hereinbelow was our office, plaintiff in the underlying criminal prosecution, and ultimately victorious in overruling Pringle "preponderance" in our Lucero I.

[60]/ See our Point I, infra.

[61]/ Not to mention "absolute" federal public policy immunity for state criminal prosecutors, Imbler, supra, and the complete absence of Congressional intent to apply § 1988 to state criminal prosecutions.

"special circumstance"[62]/ to "render such an award unjust" herein.

It is plain that we cannot apply the "ordinary" § 1988 rule to a criminal prosecution which was never contemplated by § 1988 nor intended by Congress to apply herein. The "American rule," of course, is that each party bear her own expense of litigation, including her own attorney's fees.

Is there no common law immunity against injunction?[63]/ Perhaps. What does it matter? Injunction is NOT a remedy which is "personally intimidating"[64]/ but

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[62]/ Nor need we mention public policy, see our Point I, infra, Imbler immunity, see our Point III, infra, and destruction of all state appointment statutes of counsel for indigent defendants, see out Point VI, infra.

Each of the above-recited is a separate "*special circumstance . . . render[ing] such an award unjust.*"

[63]/ See Lucero II, Appendix # 2, pp. 50-52.

[64]/ Attorney's fees remain "personally intimidating" to a criminal prosecutor, even if entered against him in his/her official capacity, rather than personally, because they take an unforeseen "bite" (and sometimes a disastrously large "bite"--instantly some $100,000 or more) out of the fiscal budget.

is often helpful to criminal prosecutors; indeed, prosecutors often rely upon opposing counsel's injunction[65]/ to "test" that prosecutor's legal action,

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Unforeseen fiscal liabilities "intimidate" not only by unexpectedly limiting the amount of official monies thereafter available to the prosecutor, but also "intimidate" by creating the disgraceful stigma of the prosecutor's "having done something wrong" as well as the shameful impression that the (elected in this case) prosecutor is fiscally incompetent to manage his budget, nor to direct the litigation in his/her office so as to avoid such fiscal surprises. Even one such "fiscal surprise"--especially in the amount, as herein, exceeding $100,000--may doom victory for incumbent prosecutors at the polls. Next year, 1994, is an election year for Long Beach City Prosecutor.

[65]/ Exactly as we relied hereinbelow upon Respondents' writ of mandate to access pretrial review of the constitutional issue of our refusal to plead Pringle "preponderance" in our criminal complaints. The initial decision by our state Court of Appeal, ___ Cal.App.3d ___ [244 Cal.Rptr. 502], from which we took our second grant of review (ultimately Lucero I) before our state supreme court, correctly saw that our pleadings--alleging 12 counts of porn film exhibition against each of the three named criminal defendants (36 counts in all)--had nothing whatever to do with "single instance of use" of Lakewood Theater, but rather had to do with our failure to plead Pringle "preponderance" of porn film exhibition in the criminal complaints:

> *"A reading of the reporter's transcript of the hearing on the petition in the lower court indicates that the trial court granted the petition because the complaints failed to allege that the X-rated films exhibited met the preponderance standard established in Pringle [citation]*
>
> . . . .
>
> * * *

thereby testing and defining the law itself. Such

> *On September 4, 1987, . . . the People of the State of California petitioned this court for a writ of mandate to compel the Los Angeles Superior Court to vacate its August 5, 1987, Judgment for Issuance of Peremptory Writ of mandate which ordered the Long Beach Municipal Court to sustain, with 30 days leave to amend, the demurrers of real party in interest to the misdemeanor complaints.*
>
> *On September 9, 1987, this court denied the People's petition for writ of mandate.*
>
> *On November 18, 1987, this state's high court granted the People's petition for review, transferred the case back to us and directed us to issue an alternative writ. On December 3, 1987, we complied with the Supreme Court's order."*
>
> 244 Cal.Rptr. at 503-504, emphasis added.

For Lucero II to consider Respondents' instant writ of mandate--the identically standard pro forma procedural writ of mandate our office filed repeatedly in order to "raise" this pretrial criminal matter to the highest state court--to be "actually" a "prospective remedy" in the nature of an injunction or prohibitory relief is patently absurd.

The instant writ of mandate (ours as well as Respondents') hereinbelow was nothing more than pretrial testing (criminal demurrer) of our criminal complaints in order to see what form of evidence would be needed at trial. If a criminal demurrer be somehow construed to be a "prospective injunction," then, so also must any pretrial evidentiary motion, e.g. motion to suppress evidence, be so construed. The latter verges on the ridiculous. Are all things "prospective"--even after the official filing of criminal charges--simply because they haven't yet occurred?

As we state in our text above, Respondents' instant writ of mandate cannot be construed to be "prospective relief" in the nature of an "injunction" against a criminal prosecution which has already commenced.

"testing" and defining of the law is part of the criminal legal process; it has no intimidating nor adverse fiscal consequences to the criminal prosecutor. Not so "attorney's fees." Attorney's fees attack the existence of the prosecutor's office itself by attacking the prosecutor's fiscal base. That's intimidating to any prosecutor.

That our instant writs[66]/ of mandate may NOT be construed as "prospective injunctive relief"[67]/ is plain from (1) the criminal charges ALREADY FILED AND

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[66]/ Including our own writs of mandate--several of them--to higher state appellate courts in order to obtain judicial review of Respondents' writ of mandate sustaining their original criminal demurrers. Will OUR writ of mandate, raised identically in the same litigation and for the same purpose (pretrial review of criminal demurrers) ALSO be construed as "injunctive or prospective relief" against Respondents so that we might "stop" them from some action in futuro? Hardly. Their "actions" had been on-going for 6 years before our instant criminal complaints were charged in municipal court.

How can a common law writ of mandamus (mandate) be "prospective injunctive relief" in Respondents hands, but merely procedural pretrial judicial review in OUR hands in the same case at the same time?

[67]/ See Lucero II, Appendix # 2, part II, commencing at p. 50.

PENDING, which removes all possible "prospectivity"[68]/ from our instant litigation; (2) the California Civil Code precludes injunction against a pending action and against enforcement of a criminal statute; and (3) Respondents had no standing to seek "injunctive relief" against our criminal charges because Respondent theater owners already voluntarily and unilaterally had abandoned exhibition of any porn ("adult") movies at Lakewood Theater long before Respondents filed their instant Lucero II petition for attorney's fees,[69]/ on or

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[68]/ It is hardly "prospective" relief for defendants to seek surcease from criminal charges which have already been filed and for which court dates have already been set.

[69]/ We have in our files undisputed public evidence that Respondents leased Lakewood Theater on a long-term basis to a Mr. William Ward and Mr. Arthur Bowen in the weeks before July 22, 1988, for the purpose of exhibiting general release, non-porn films at both their interior screens. Non-porn film exhibition (100%) at both screens of Lakewood Theater did in fact commence on July 22, 1988. We expect this fact will be conceded by Respondents, and evidence thereof be located easily inside their business records of ownership--or ceased ownership--of Lakewood Theater.

We have not mentioned this fact hereinbefore because we never dreamed a state appellate court would construe a common law writ of mandate to be some esoteric form of

about December 18, 1989. A pertinent case is

Sullivan v. Little Hunting Park, 396 U.S. 229, 235 [24 L.Ed.2d 391, 396, 90 S.Ct. 400][70]/ which disallowed a

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"injunctive" or "prospective relief" entitling Respondents to an exemption from Fogelson public policy, to skirt Imbler immunity, and to allow attorney's fees against us under § 1988! Now that Lucero II has done so (as of its decision, May 7, 1993), we deem the foregoing undisputed facts to be relevant herein to the issue of Respondents' purported "injunctive relief" against our office.

[70]/ See Harlan, J., dissenting:

"Sullivan and Freeman sued under 42 USC §§ 1981, 1982 for injunctions and monetary damages. Since Freeman no longer resides in the area served by Little Hunting Park, Inc., his claim is limited solely to damages."

Also hereinbelow. Respondents cannot have sought purported "injunctive" nor "prospective" relief to exhibit porn films at Lakewood Theater in their fee petition, filed for the first time December 18, 1989, when Respondents had for some 2 years established their own policy of no porn-film exhibition at Lakewood Theater, and where for a year and a half Respondents had disabled themselves from all control of Lakewood Theater film exhibition by leasing that theater to third parties for the latter's full time exhibition of non-porn movies at both interior screens at Lakewood Theater.

Respondents simply had no standing to bring "injunctive" nor "prospective relief" to allow porn film exhibition at Lakewood Theater. Therefore, Respondents' only concern hereinbelow was for "damages." And the latter "damage" remedy, was, of course, precluded by Imbler immunity.

See also City of Los Angeles v. Lyons (1983) 461 U.S. 95 [75 L.Ed.2d 675, 103 S.Ct. 1660] failing to find injunctive relief appropriate where past illegality was not continuing, and unlikely to recur. It can't "recur" hereinbelow, now that

plaintiff standing to bring "injunction" where that plaintiff had disabled himself from such relief by moving out of the neighborhood serviced by the local community park. Here "non-plaintiff" Respondents did likewise by choosing a policy in 1987 of exhibiting wholly non-porn films at Lakewood Theater, then disabling themselves from all control in selection of Lakewood Theater movies by their "long term lease" of that theater to third party control in 1988. Any allegation of Respondents' "injunctive relief" or "prospective relief" in order to exhibit 100% porn movies upon any screen at Lakewood Theater in Lucero II is, therefore, not supported factually hereinbelow.

Nor was 42 U.S.C. § 1983 (nor its attorney's fees aspect § 1988) intended to become a "general barratry"

Lakewood Theater has been voluntarily torn down and replaced with office buildings. It is absurd, therefore, to construe Respondents' writ of mandate to be "injunctive" or "prospective" relief herein.

statute rewarding any plaintiff with attorney's fees anytime s/he sued someone, thereby overruling the "American rule" of attorney's fees wherein each party bears its own costs of litigation, including its own attorney's fees. "Barratry" was defined at common law as, *"the offense*[71]*/ of frequently exciting and stirring up quarrels and suits, either at law or otherwise."*[72]/ 42 U.S.C. § 1988 does tend to "subsidize" litigation,[73]/ but was never intended by Congress to be a "general barratry statute" awarding attorney's fees to any plaintiff anytime. By its own wording § 1988 is LIMITED to an "*action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title*, and not for attorney's fees anytime to any plaintiff.

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[71]/ Barratry was illegal at common law.

[72]/ Black's Law Dictionary (West, centennial, 6th, ed., 1990), p. 150.

[73]/ See Judge Kocoras' castigation of that statue herein at our note # 45.

Because our instant Lucero II attorney's fees were wrongfully awarded to a non-plaintiff in a state criminal prosecution, it was without statutory basis.

V

IT VIOLATED THE STATE PROSECUTOR'S FEDERAL "DUE PROCESS/FAIRNESS/NOTICE" TO LEARN FOR THE FIRST TIME AT THE CONCLUSION OF LENGTHY STATE CRIMINAL LITIGATION OVER THE SUFFICIENCY OF THE STATE CRIMINAL ACCUSATORY PLEADING, BEGINNING IN THE INFERIOR MUNICIPAL COURT WHERE THE PROSECUTOR WAS THE CLEAR CRIMINAL "PLAINTIFF" REPRESENTING THE STATE OF CALIFORNIA AND THE NAMED CRIMINAL DEFENDANTS THE "DEFENDANTS" IN THAT CRIMINAL MATTER, AND ENDING FINALLY IN THE STATE SUPREME COURT WHERE THE PROSECUTOR "PLAINTIFF" WON CLEAR VICTORY OVER THESE NAMED CRIMINAL "DEFENDANTS," TO LEARN TO THE PROSECUTOR "PLAINTIFF'S" GREAT SURPRISE THAT THE PROSECUTOR WASN'T A "PLAINTIFF" AT ALL IN THIS LITIGATION, BUT WAS IN FACT A FEDERAL CIVIL "DEFENDANT" IN AN UNPLEADED AND UNPROVED 42 U.S.C. § 1983 ACTION, WITH THE CRIMINAL DEFENDANTS BEING SOMEHOW CIVIL "PLAINTIFFS" PURSUANT TO THAT FEDERAL STATUE SO AS TO ALLOW THEM ATTORNEYS FEES UNDER 42 U.S.C. § 1988

Fundamental fairness and basic due process

require advance notice to a defendant that she/he/it is being sued. The latter never happened hereinbelow. Neither the "People of the State of California" nor the City of Long Beach were named as "defendants" in any action commenced by our Respondents as "plaintiffs" therein. To be sure, Respondents did "respond" to our criminal prosecution by "demurring" to our criminal pleading. They thereafter pursued[74]/ that overruled criminal demurrer into higher state courts for appropriate pretrial review by writ of mandate. But as our Point I, infra, conclusively demonstrates, such action by Respondents was purely part of the criminal prosecution

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[74]/ And so did we. It was in the public interest that we or Respondents, or both, pursue the constitutional issue of Pringle "preponderance" into higher appellate courts for definitive ruling, one way or the other.

It was not in the public interest--the sole interest governing public prosecution by our prosecutor's office--that we seek "dismissal" of such a potentially constitutionalizing definition, which our office welcomed and sought to clarify.

Our civil counsel, the City Attorney's Office--whose sole loyalty, unlike our own, is to the City of Long Beach--might have "sought dismissal" had our prosecutor's office truly been sued by Respondents in a civil § 1983 action.

which OUR OFFICE commenced,[75]/ not any independent "civil action" authorized by 42 U.S.C. § 1988. Had our office thought it was truly being sued in a civil capacity in any form, we would instantly have turned "defense" of such "civil litigation" over to the legal department of the City of Long Beach, i.e. their City Attorney.

Nor was the City of Long Beach itself ever named hereinbelow, as it had been named by Respondents in some of the numerous civil actions over Lakewood Theater mentioned herein at our note # 5, infra. What Respondents were UNABLE to accomplish by way of attorney's fees in the aforementioned truly civil litigation against properly named municipal or other civil defendants (and correctly "defended" by the civil Long Beach City Attorney, NOT our office, the Long Beach

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[75]/ And which was protected in its instant "core activity" of filing criminal charges by Imbler "absolute immunity" for such criminal prosecution hereinbelow.

Prosecutor) they were IRONICALLY able to accomplish in defending our instant criminal prosecution hereinbelow.[76]/ It violated our "due process"

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[76]/ Lucero II rather cavalierly states that neither our nor the City's "due process/notice" was violated hereinbelow:

> *"Thus, in Brando v. Holt the Court held the city was responsible for paying the attorney fees awarded to the prevailing plaintiffs in a section 1983 action against the city's director of police sued in his official capacity. (Id. at p. 471, 105 S.Ct. at p. 877.)*
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> *In Hutto v. Finney,*/ supra, 437 U.S. 678, 98 S.Ct. 2565, the Court rejected the state attorney general's argument the state could not be responsible for attorney fees under section 1988 based on an action for injunctive relief where prison officials were the named defendants . . . ."*
>
> Emphasis added.
>
> */Any reference to Hutto v. Finney (1978) 437 U.S. 678 [57 L.Ed.2d 522, 98 S.Ct. 2565] in our instant context is ludicrous; Hutto allowed express "financial penalty" (437 U.S. at 691) by way of "attorney's fees for bad faith" (id.) against "recalcitrant" Arkansas prison officials' disobedience to federal court orders. Our trial court below expressly found "good faith" in our instant criminal prosecutions hereinbelow.

The short answer to the above is that our office was protected "absolutely" by Imbler immunity in its decision to institute the instant criminal prosecution against Respondents. We, therefore, took no notice of nor considered at all Respondents' threatened "civil intimidation" by 42 U.S.C. §§ 1983, 1988 nor any other federal (nor state) statute. The whole purpose of our "absolute immunity," of course, exists that we may safely ignore such "intimidation" in our decision to

commence criminal prosecution. Our office's "absolute immunity," therefore, HARDLY represented the City of Long Beach, which might have raised separate and additional civil defenses, as it successfully did in all the civil litigation mentioned herein at our note # 6, infra.

We underscored the important phrases "director of police" and "prison officials" in Lucero II quoted above because of the latter's blatant failure to notice the "absolute immunity" accorded state prosecutors, BUT only "qualified immunity" accorded police officers and/or prison officials. See Butz v Economou (1978) 438 U.S. 478 [57 L.Ed.2d 895, 98 S.Ct. 2894]:

> *"The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested [citation] controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. [Citation.] Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.*
>
> *. . . We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or deportation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and that sanctions should be sought."*
>
> 438 U.S. at 512, 515 [57 L.Ed.2d at 919, 921], emphasis added.

Our instant Lucero II was apparently oblivious to the entire concept of prosecutorial "absolute immunity"

hereinbelow to find out belatedly that we ought not to have ignored, but OUGHT TO HAVE BEEN INTIMIDATED[77]/ by Respondents' slightest allegation of § 1988 fiscal vengeance. It violated the City's "due process" by disallowing the City its proper attorney--an attorney which might have done other than simply ignore and refuse intimidation by Respondents' fiscal claims herein.

VI

IF, AS HEREIN, ORDINARY RETAINED CRIMINAL DEFENSE COUNSEL (PRESUMABLY ALREADY PAID A RETAINER FEE UP-FRONT BY THEIR NON-INDIGENT CRIMINAL CLIENTS) MAY OBTAIN NEW AND DUPLICATE ATTORNEY'S FEES--THIS TIME AT STATE PUBLIC EXPENSE PURSUANT TO 42 U.S.C. § 1988 WHERE, AS HEREIN, IT IS EXPRESSLY CONTRARY TO STATE PUBLIC POLICY TO ALLOW IT UNDER STATE LAW--THAT ERRONEOUSLY EXALTS 42 U.S.C. § 1988 INTO A DE FACTO "FEDERAL REPEAL" OF EVERY STATE, FEDERAL, AND TERRITORIAL "COURT

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hereinbelow. That was surprising.

[77]/ Contrary to the plain meaning of Imbler, supra, and state public policy (Fogelson, supra).

APPOINTMENT" STATUTE WHICH LIMITS PAYMENT OF PUBLIC FEES SOLELY TO THOSE CRIMINAL DEFENSE ATTORNEYS APPOINTED BY THE COURT, AUTHORIZED BY STATE STATUTE, AND DISBURSED ACCORDING TO STATE PROCEDURES

U.S. states and territories bear great expense to enact, administer, and pay attorneys to represent indigent criminal defendants in their respective criminal justice systems.[78]/ Lucero II brings "total chaos"[79]/ to those state/territorial administered attorney fee statutes. Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792] mandates court-appointed attorneys for INDIGENT criminal defendants. Lucero II improperly applies 42 U.S.C. § 1988 for payment of non-court appointed attorney's fees to NON-INDIGENT criminal defendants as well, and despite the state-

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[78]/ In California the attorney appointment statutes are found at Penal Code §§ 987.2 et seq. Every state and U.S. territory has such statutes. We need not articulate them all in this Petition, but will be happy to do so upon further briefing, if necessary.

[79]/ Fogelson, supra. See our Point 1, infra.

regulated court-appointment statutes in each state's criminal justice system. No longer will state/territorial court-appointed counsel statues be necessary where, as herein, judges have Lucero II "federal" supremacy to grant attorney's fees to wealthy[80]/ criminal defendants, who have presumably already paid those same attorneys their retainer fees. For this reason alone Lucero II must be vacated herein.

VII

CRIMINAL DEFENDANTS MAY NOT BE DEEMED "PREVAILING PARTIES" UNDER 42 U.S.C. § 1988 WHERE THEY NEVER PLEADED NOR PROVED A VIOLATION OF § 1983 AND WHERE AT BEST THEY ACCOMPLISHED HIGHER REVIEW IN STATE APPELLATE COURTS MERELY TO SUSTAIN THEIR DEMURRERS IN THE CRIMINAL PROSECUTION, BUT WHERE THE STATE PROSECUTOR SIMULTANEOUSLY OBTAINED REVIEW IN THE HIGHEST STATE COURT OVERRULING ALL STATE PRECEDENTIAL AUTHORITY WRONGFULLY INTERPRETING THIS COURT'S DECISION IN YOUNG V. AMERICAN MINI THEATRES, INC. TO CREATE AN ERSTWHILE

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[80]/ Indeed, as herein, international corporate clients--Walnut Properties, Inc., a California corporation.

STATE "PREPONDERANCE" STANDARD (50+% PORN FILM EXHIBITION)--A CONSTITUTIONAL STANDARD NOW ABOLISHED BY VIRTUE OF OUR INSTANT STATE COURT LITIGATION--WHERE THE STATE PROSECUTOR SUBSTANTIALLY ALTERED THE LEGAL RELATIONSHIP OF THE INSTANT PARTIES SO AS TO RENDER STATE PROSECUTION OF ADULT ENTERTAINMENT THEATERS EASIER HEREINAFTER

Space prevents full discussion herein. Respondents may not be considered "prevailing parties" under § 1988, even if the latter might somehow apply to our instant criminal prosecution, for the simple reason that the only "changed legal relationship of the parties" which occurred in our Lucero I was final abolition of the Pringle "preponderance" standard for defining "use" of an (adult) "theater" in our instant Young-type (Detroit-type non-cluster) porn-zoning ordinance. The leading case is Texas State Teachers Assn. v. Garland Independent School Dist. (1989) 489 U.S. 782 [103

L.Ed.2d 866, 109 S.Ct. 1486].[81]/ Because

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[81]/ *"We must decide today the proper standard for determining whether a party has 'prevailed' in an action brought under certain civil rights statutes such that the party is eligible for an award of attorney's fees under . . . § 1988."*

489 U.S. at 784 [103 L.Ed. at 872, emphasis added.

In "deciding" the correct § 1988 standard for "prevailing party" status Texas State Teachers Assn. adopted a two-fold test, i.e. (1) an "absolute" test, and (2) a "changed legal relationship" test for those parties meeting the absolute test. The first (1) absolute test that a party must meet in order to warrant "prevailing party" status for § 1988 is "some relief on the merits." Relief (no matter how much) on pleadings or other legal posturings short of relief on the merits cannot suffice for § 1988 "prevailing party" status.

"Respect for ordinary language requires that a plaintiff receive some relief on the merits of his claim before he can be said to prevail."

489 U.S. at 792 [103 L.Ed.2d at 877, emphasis added.

Petitioners achieved no "relief on the merits" instantly. They received at best purely technical relief on the pleadings: "The People . . . are not entitled to proceed with the action as pleaded." Lucero I, supra, Appendix # 1, p. 23, emphasis added. All our office needed to do was to amend our criminal pleadings to reflect the new Lucero I "regular and substantial course of conduct" standard (id., n. 11), and we could easily have proceeded with our instant criminal action below. And the only reason we did not do so was by then Petitioners had given up the fight (on the merits, by the way), elected to exhibit purely non-porn movies at Lakewood Theater, and eventually leased the theater to third parties for exhibition of non-porn

movies. Petitioners took nothing by way of "merits" from this litigation.

> *"Where the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied."*
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> Id., emphasis added.

Because Petitioners never passed the "absolute" test of "relief on the merits," we need not discuss the auxiliary additional test necessary for "prevailing party" status, i.e. that the litigation have wrought a "change in the law" in favor of the prevailing party.

> *"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non."*
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> 489 U.S. at 792-793 [103 L.Ed.2d at 878], emphasis added.

For "prevailing party" status to be accorded a litigant the latter must have not only accomplished something on the merits (the "absolute" test mentioned earlier) it must also have wrought a "material alteration of the legal relationship of the parties," that is, a substantive "change" in the illegal practices or policies of the losing litigant. The latter Petitioners never accomplished hereinbelow. Petitioners never won anything at all which would preclude our office from prosecuting them, other than we would have to do it on an amended complaint. "Single instance of use," the only asserted victory for Petitioners, was NOT any "change" in the law at all, let alone a change in their favor, nor did Petitioners accomplish any

Petitioners succeeded in meeting neither the federal (1) "absolute" test of victory on the merits, nor did it meet the federal requirement of (2) "material alteration of the legal relationship of the parties," therefore, Petitioners cannot be accorded "prevailing party" status herein. They, therefore, cannot be awarded attorney's fees under § 1988.

VIII

IT WAS EXPRESS "ABUSE OF 42 U.S.C. § 1988" TO ALLOW FEES INSTANTLY ON THE BASIS OF CRIMINAL DEFENDANTS' HYPOTHETICAL "VICTORY" ON THE ISSUE OF "SINGLE INSTANCE" OF PORN FILM EXHIBITION, WHERE STATE LAW PRIOR TO OUR INSTANT LUCERO I STATE SUPREME COURT DECISIONS WAS THAT A "PREPONDERANCE" (NOT MERELY A "SINGLE INSTANCE") OF PORN EXHIBITION WAS EXEMPTED FROM OUR PORN-ZONING ORDINANCE, THAT IS, CRIMINAL DEFENSE COUNSEL IMPROPERLY "ABANDONED HIS CLIENT" BY ARGUING IN FAVOR OF "SINGLE INSTANCE" IN HOPES OF HAVING "ANY VICTORY AT ALL" WHICH MIGHT QUALIFY AS POSSIBLY PREVAILING ON THAT ISSUE SO AS TO SEEK A

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alteration in the "practices or policies" of our office so as to render them more immune from criminal prosecution.

PUBLIC ATTORNEY FEE UNDER § 1988 WHEN COUNSEL OUGHT TO HAVE ARGUED FOR THE GREATEST PROTECTION OF HIS CLIENTS (PREPONDERANCE OR MORE) RATHER THAN THE SLIGHTEST POSSIBLE ("SINGLE INSTANCE") PROTECTION OF MOVIE OWNERS/EXHIBITORS

Federal courts have begun to see express "abuse" (as they call it) of 42 U.S.C. § 1988 where a plaintiff's counsel "abandons" the client's extreme claims on the merits in order to obtain more modest relief, sometimes abandoning all claim to damages other than "nominal damages," purely to insure counsel's OWN fees pursuant to § 1988, irrespective of the "bust" (even counsel-inculcated "bust") achieved on the merits of the litigation. Such a case was Romberg v. NIchols (9th Cir. 1992) 970 F.2d 512, 521, wherein plaintiff's counsel argued to the jury that not the original prayer for $2,000,000 was necessary to do justice, but rather even a verdict of "$1 nominal damages" would suffice--whereupon that jury promptly returned a verdict of "$1

nominal damages."[82]/ Having "prevailed" on the merits, however, plaintiff's counsel was entitled to § 1988 attorney's fees, which counsel promptly collected to the utter chagrin of his client's "$1.00."[83]/

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[82]/ We think counsel did the same here in arguing a movie theater's "single instance" of porn exhibition must be immune from prosecution. State law (Pringle) before our instant Lucero I was that "182 instances" of porn film exhibition at a movie theater was "immune" from our instant porn-zoning ordinance. By defense counsel's arguing for "single-instance" (a single exhibition? a single day's repeated exhibitions?), rather than Pringle "preponderance," defense counsel implicitly conceded Pringle "preponderance" to be incorrect and in need of vast reduction. This may have helped our efforts to overrule Pringle and injured Respondents' interests in maintaining Pringle "preponderance." We think counsel "abandoned" his clients in so doing thus precluding recovery of § 1988 attorney's fees.

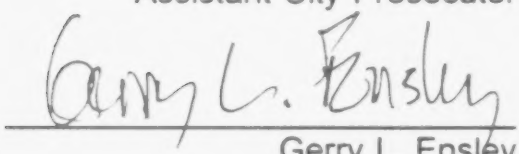
[83]/ This, stated the majority in Romberg, was "abuse" of § 1988 and abandonment of the client by the attorney solely to line the attorney's own pockets despite his having voluntarily torpedoed his own client's damages claim.

CONCLUSION

For the foregoing reasons the judgment for attorney's fees pursuant to 42 U.S.C. § 1988 must be reversed.

LONG BEACH CITY PROSECUTOR
John A. Vander Lans
City Prosecutor

Robert R. Recknagel
Assistant City Prosecutor

By 

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